

SENATE BILL REPORT

SSB 5714

As Amended by House, April 15, 2019

Title: An act relating to the reliability of evidence in criminal proceedings.

Brief Description: Concerning the reliability of evidence in criminal proceedings.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Dhingra, Padden, Salomon, Kuderer, Billig, Darneille, Das and Hasegawa).

Brief History:

Committee Activity: Law & Justice: 2/18/19, 2/21/19 [DPS].

Floor Activity:

Passed Senate: 3/04/19, 48-0.

Passed House: 4/15/19, 97-0.

Brief Summary of First Substitute Bill

- Establishes a work group to adopt model guidelines and law enforcement training for evidence-based best practices to maximize the reliability of eyewitness testimony.
- Establishes a work group to adopt model guidelines and prosecutor training for evaluating informant testimony, and prescribes procedures that must be used in a locally developed protocol.
- Requires a judge to instruct the jury in substantially similar form as that in the bill to use extra caution when evaluating an informant's testimony if the Washington Pattern Instruction Committee fails to adopt its own jury instruction language by December 1, 2019.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5714 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Holy, Kuderer, Salomon and Wilson, L..

Staff: Melissa Burke-Cain (786-7755)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background: Social sciences research shows eyewitness evidence can be unreliable. Eyewitness misidentification can be one factor leading to a wrongful conviction. In 2014, the National Academy of Sciences published a comprehensive review of scientific literature on eyewitness testimony. The report *Identifying the Culprit: Assessing Eyewitness Identification*, explains the causes of eyewitness misidentification. It also suggests solutions to mitigate the impact of unreliable eyewitness testimony. Law enforcement and the courts have an obligation to reduce the chances of a wrongful conviction based on eyewitness misidentification, according to the National Center for State Courts (NCSC). The NCSC recommends that courts take note of recent research developments when addressing eyewitness misidentification problems.

Another factor may lead to a wrongful conviction is exaggerated or false testimony from incentivized informants. Criminal informants may provide useful information during criminal investigations and may be important trial witnesses. Informants may be unwilling to testify in court unless they receive something in return for their testimony. Commonly, informants agree to testify because the state offers an incentive for their testimony. Courts recognize the risk of false or exaggerated testimony when informants testify for the state in criminal trials. Prosecutors must evaluate the information or testimony offered by an informant and assess its reliability before they use it. Prosecutors disclose preliminary information about witnesses to defense counsel. Many state and federal trial courts, including those in the ninth, fifth, and tenth circuits, instruct the jury in a criminal case to use extra care when evaluating the truthfulness of incentivized informant testimony.

Summary of First Substitute Bill: The president of the Senate and the speaker of the House of Representatives must appoint a work group to develop evidence-based best practices for law enforcement use when collecting eyewitness testimony in criminal investigations. The work group will also develop an eyewitness testimony training curriculum. The work group must complete its work and submit its report to the Legislature no later than November 30, 2019. The work group must reconvene every three years to revise the model guidelines to incorporate developments in science-based best practices. No later than December 31, 2020, each law enforcement agency must adopt and implement a written local protocol consistent with the work group's guidelines and submit a copy of its protocol to the work group.

The president of the Senate and the speaker of the House of Representatives must appoint a work group to adopt model guidelines and a training curriculum on the reliability of informant testimony. A county prosecutor must use the guidelines, or a locally developed protocol, to evaluate informant testimony before it is used in a criminal case, and to make disclosures to defense counsel. The term "informant" means:

- any person who was previously unconnected with the criminal case as either a witness or a codefendant;
- claims to have relevant information about the crime;
- is currently charged with a crime, or is facing potential criminal charges, or is in custody; and
- at any time receives consideration in exchange for providing the information or testimony.

The work group must complete its work and submit a report to the Legislature no later than November 30, 2019.

No later than December 31, 2020, each county prosecutor must adopt and implement a written protocol for the use of informants consistent with the model guidelines and submit a copy to the work group. If a county prosecutor adopts its own protocol, it must include the procedures in the bill to specify preliminary disclosures to the defense and procedures for evaluating an informant's reliability.

If the Washington Pattern Instruction Committee has not adopted an informant testimony jury instruction by December 1, 2019, the courts must instruct the jury to exercise extra caution when evaluating the informant's testimony using an instruction substantially similar to the language in the bill.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: Yes.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on First Substitute: PRO: This bill takes the next step in work that is already being done to make sure our state has a uniform approach, common practices, and policies related to incentivized testimony. In Washington State, 48 persons have been exonerated having spent almost 300 years in prison after wrongful conviction. We hope to reduce that number, and this bill is an important step in the right direction. When a person is wrongfully convicted, it is not only unfair to that person but it is also unfair to the victim. The person who really committed the crime is still at large. Prosecutors do not want to convict innocent people. We do sometimes have to use informants. Prosecutors across the state support the approach in the bill. It is similar to what was done when developing the statewide child abuse protocols. Prosecutors only use informants as a last resort. We want to make sure prosecutors across the state are all on the same page. One prosecutor has done a great deal of research on what the federal courts are using for a jury instruction. The one proposed here is based on the best one we found. The bill is a consensus product.

OTHER: This bill represents a great deal of progress, but where the bill imposes a jury instruction on the judicial branch in Section 4, two problems are created. There is a separation of powers issue when the Legislature tries to control what judges do in the courtroom. The WPI pattern jury instructions are developed for use in the courtroom and allow each judge to adapt the instructions to their specific courtroom situations. Jury instructions should be left to the judiciary. This kind of instruction should come through the WPI committee. The superior court judges' association would be happy to take this to the WPI committee. On the issue of eyewitness testimony, a model policy has already been developed. The WASPC and the Criminal Justice Training Center are already developing a training curriculum to address eyewitness testimony in investigations. It does not make sense to do that work over again.

Persons Testifying: PRO: Senator Manka Dhingra, Prime Sponsor; Andy Miller, Washington Association of Prosecuting Attorneys; Lara Zarowsky, Policy Director, Innocence Project Northwest; Mallory Barnes-Ohlson, Innocence Project Northwest.

OTHER: Stephen Warning, Superior Court Judges Association; James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Directs the Washington Association of Sheriffs and Police Chiefs to administer the eyewitness evidence work group.
- Requires the eyewitness evidence work group to consult with the University of Washington Tacoma and the Criminal Justice Training Commission to design a pilot project for implementing and evaluating the eyewitness evidence training curriculum the workgroup develops.
- Removes the requirement for local law enforcement agencies to adopt protocols for the collection of eyewitness evidence.
- Removes the requirement for the eyewitness evidence work group to reconvene every three years and terminates the work group on December 31, 2022.
- Directs the University of Washington law school to administer the work group on the reliability of informant testimony in consultation with the Washington Association of Prosecuting Attorneys and Washington Innocence Project.
- Requires the informant testimony work group to coordinate training for prosecutors and defense attorneys on the model guidelines for informant testimony with the Washington Association of Prosecuting Attorneys, Washington Defender Association, and Washington Association of Criminal Defense Lawyers and terminates the work group on December 31, 2022.
- Authorizes either the prosecutor or the defendant to request the trial court to instruct the jury to use caution when evaluating the credibility of an informant instead of requiring a judge to provide such an instruction.
- Requires the court to use the following jury instruction language unless the trial court decides otherwise: "The testimony of an informant, given on behalf of the [State] [City] [County] in exchange for a legal advantage or other benefit, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You, the jury, must weigh the credibility of the testimony. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth."
- Makes technical changes to cross-references, sections, subsections, and section headings and directs the bill must be codified as a new chapter in Title 10 RCW.